

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

RICHARD BAYS

Petitioner,

-v-

WARDEN, Ohio State Penitentiary

Respondent.

Case No. 3:08-cv-076

**Judge Thomas M. Rose
Magistrate Judge Michael R. Merz**

**ENTRY AND ORDER ADOPTING IN PART THE MAGISTRATE
JUDGE’S REPORT AND RECOMMENDATIONS (Doc. #23) AND
ADOPTING THE MAGISTRATE JUDGE’S SUPPLEMENTAL REPORT
AND RECOMMENDATIONS (Doc. #30)**

This matter comes before the Court pursuant to Petitioner Richard Bays’ (“Bays”) Objections to Magistrate Judge Michael R. Merz’s Report and Recommendations (doc. #26), the Warden’s Objections to Judge Merz’s Report and Recommendations (doc #27) and Bay’s Objections to Judge Merz’s Supplemental Report and Recommendations (doc. #32). The Report and Recommendations was issued on March 16, 2009. (Doc. #23.) On April, 15, 2009, Bays filed objections (doc. #26) and on that same date the Warden filed objections (doc. #27) to the Report and Recommendations.

Judge Merz then, on April 29, 2009, filed a Supplemental Report and Recommendations (doc. #30) to which Bays has again objected (doc. #32). The Warden has filed a response to Bay’s Objections to the Supplemental Report and Recommendations. (Doc. #33.) Bays’ and the Warden’s Objections to the Report and Recommendations and Bays’ Objections to the Supplemental Report and Recommendations are, therefore, ripe for decision.

The Report and Recommendations and Supplemental Report and Recommendations

address procedural default questions before an answer is filed at the request of the Parties. (See Proposed Habeas Schedule, Exhibit A to Doc. #11.) Specifically, these two Report and Recommendations address whether Grounds Four, Nine and Ten of Bays' Petition for a Writ of Habeas Corpus are procedurally defaulted.

In the Report and Recommendations, Judge Merz recommended (1) dismissing the "reasonable investigation" prong of the Fourth Ground for Relief as barred by procedural default, but not the "failure to adequately prepare" prong; (2) dismissing the Ninth Ground for Relief as barred by procedural default and (3) dismissing the Tenth Ground for Relief without prejudice to renewal because it has not yet been exhausted in the State courts.

Bays then objected to Judge Merz's recommendation that the "reasonable investigation" prong of the Fourth Ground for Relief be dismissed and to Judge Merz's recommendation that the Ninth Ground for Relief be dismissed. (Doc. #26.) The Warden objected to Judge Merz's failure to dismiss the "failure to adequately prepare" prong of Bays' Fourth Ground for Relief as being procedurally defaulted. (Doc. #27.)

Judge Merz then issued a Supplemental Report and Recommendations. (Doc. #30.) Therein, he recommends that Bays be permitted to proceed on the "reasonable investigation" prong of his Fourth Ground for Relief as limited to failure to investigate family history for mitigating evidence. Also, Judge Merz again, after additional analysis, determined that Bays' Ninth Ground for Relief is procedurally defaulted. The Supplemental Report notes that neither Party objected to dismissing the Tenth Ground for Relief as unexhausted.

As required by 28 U.S.C. §636(b) and Federal Rules of Civil Procedure Rule 72(b), the District Judge has made a de novo review of the record in this case and particularly of the

matters raised in the Parties' various Objections. Upon said review, the Court finds that Bay's Objections to the Magistrate Judge's Supplemental Report and Recommendations and the Warden's Objections to the Report and Recommendations are not well taken and they are **OVERRULED**.

As limited by the Supplemental Report and Recommendations, Bays' Fourth Ground for Relief is not procedurally defaulted and is thus not dismissed on that basis. Regarding the failure to investigate prong of his Fourth Ground for Relief, Bays is limited to the claim that his counsel were ineffective for failure to investigate family history for mitigating evidence. Bays' Ninth Ground for Relief is procedurally defaulted and is dismissed on that basis. Bays' Tenth Ground for Relief has not been exhausted in State court and is dismissed on that basis without prejudice to renewal after exhaustion.

DONE and **ORDERED** in Dayton, Ohio, this Ninth day of June, 2009.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record